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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-95

STATE OF TENNESSEE; WINFIELD DUNN, as Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; TENNESSEE AIR NATIONAL GUARD; TENNESSEE AIR NATIONAL GUARD, 134th Air Refueling Group (TAC); MAJOR GENERAL WILLIAM C. SMITH, as Adjutant General of the National Guard of the State of Tennessee; COLONEL ROBERT W. AKIN, as Commander of the 134th Air Refueling Group; LIEUTENANT COLONEL DAVID L. CARTER, as Commander of the 134th Combat Support Squadron; LIEUTENANT COLONEL BOB ARR, as Commander of the 151st Air Refueling Squadron; LIEUTENANT COLONEL WILLIAM D. ASBURY, as Commander of the 134th Supply Squadron; LIEUTENANT COLONEL THOMAS P. WEBB, III, as Commander of the 134th Camron Squadron; and LIEUTENANT COLONEL MARSHALL C. PEIRCE, as 134th Director of Operations,
Petitioners

v.

BILLY DON DUNLAP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF OF RESPONDENT

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OPINIONS BELOW

Respondent concurs in the Petitioners' statement pertaining to the opinions below.

JURISDICTION

Respondent does not question the jurisdiction as set forth in Petitioners' brief.

QUESTIONS PRESENTED

Respondent is of the opinion that the Petitioners' brief misstates the issue to be reviewed. One of the issues presented for determination is whether or not a federal court may review a military commander's decision to deny a request for re-enlistment when the complaint, filed in the court, sets forth allegations that the decision was made for other than military reasons and did not involve an application of military expertise. Petition agrees with the additional issue presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "...(N) or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions:

32 U.S.C. § 709 (e)(3) (Supp. 1974) provides:

> (3) a technician may, at any time, be separated from his technician employment for cause by the adjuant general of the jurisdiction concerned.

The Respondent accepts the other constitutional and statutory provisions involved as set forth in the Petitioners' brief.

STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate insofar as it pertains to the relief sought by the Respondent, Billy Don Dunlap, in his complaint filed in the Federal District Court. The complaint sought a judgment declaring the discretion or prerogative allegedly vested in a commander, to decide whether or not it is in the best interest of the Air National Guard to allow a member to re-enlist, as it was used against the Respondent in the instant case, to be so vague and lacking in ascertainable standards or criteria to guide or guage the commander's decision as to be unconstitutional and thereby to have constituted a deprivation of the Respondent's right to due process. The complaint further sought to enjoin the Petitioners from pursuing any action against the Respondent which would be discriminatory in nature or constitute a deprivation of his rights, privileges or immunities. (Petitioners' App. 19-26).

Respondent respectfully makes the following additions to the Petitioners' statement of the case:

The Respondent was originally informed that his commander, in the exercise of his discretion or

prerogative, had decided that it was not in the best interest of the Tennessee Air National Guard to allow his re-enlistment. Thereafter, Respondent continued in his efforts to effect his re-enlistment. Respondent's commander convened a board of officers to consider whether or not the Respondent should be allowed to re-enlist. Although the Respondent requested to be allowed to appear before the board, for the purpose of receiving a fair and impartial hearing, and further requested that he be supplied a copy of any charges or statements made against him, both requests were denied by the Petitioners.

Respondent's complaint alleged that the action taken by his commander and the board of officers was purposeful and intentional action that was calculated to result in effecting the Respondent's discharge from his technician's job with the Tennessee Air National Guard and would place the Respondent in such a position as would frustrate or deny any opportunity for him to effectively pursue an administrative remedy. The complaint further alleged that the Respondent's commander's action was arbitrary, capricious, unreasonable and amounted to an abuse or misuse of his allegedly vested discretion or prerogative and that the commander's and board of officers' action was discriminatory in nature and thereby resulted in a deprivation of certain of the Respondent's rights, privileges and immunities. As a result of the action taken by the Respondent's commander and the board of officers, which action culminated in the Respondent's loss of his membership in the Tennessee Air National Guard and his technician's employment therewith, the Respondent filed this action on January 11, 1974. (Petitioners' App. 19-26).

The Petitioners responded by filing a motion to dismiss and alternate motion for summary judgment to which the Respondent filed a response. (Petitioners' App. 14 and Respondent's App. 1-8).

The Respondent accepts the remainder of the Petitioners' statement of the case as being substantially correct.

SUMMARY OF ARGUMENT

The complaint filed by the Respondent, in the case at bar, contained such allegations of deprivation of constitutional rights, abuse or misuse of allegedly vested discretion or prerogative and actions outside the scope of the military authorities statutory and regulatory authority, as to justifiably warrant a review of the actions of the Respondent's commander and the board of officers. Furthermore, the decision made by the Respondent's commander was a military decision that was made for non-military purposes or reasons.

The Respondent does not seek to have the court to substitute its judgment or reasoning for that of the military authorities, but merely seeks to have the court to make the military authorities exercise their discretion and take action against the Respondent in a permissible manner and in full compliance with the Constitution of the United States and applicable statutes and regulations.

It is clearly evident, that taking all the facts and circumstances, together with the Respondent's past military record, and placing the same in proper perspective, that the Respondent had a justifiable and

reasonable expectation that he would be allowed to re-enlist. Therefore, the Respondent became vested with a valuable "property" interest.

The decision of the Court of Appeals was based on a sound judicial appraisal of the record and all relevant facts involved in this cause. Contrary to the Petitioners' position, the Court of Appeal's opinion was not a departure from the accepted and usual standard of review of military decisions but was in strict conformity therewith and was reiterative of the same. Therefore, if the decision of the Sixth Circuit is allowed to stand, it would not result in an increased potential of review of military decisions.

ARGUMENT

The Respondent, Under the Facts of the Case at Bar, Has a Protectable Interest, in Re-Enlistment in the National Guard, That Is Subject to Judicial Review.

The Respondent agrees, as is well noted in Petitioners' brief, that the courts have historically adopted a doctrine of nonreviewability of military decisions. This doctrine is derived from the courts' "unwillingness to second-guess judgments requiring military expertise." *Mindes v. Seaman,* 453 F. 2d. 197, 199 (5th Cir. 1971), especially where the complaining party seeks to have the court substitute its judgment for that of the military. The Courts have further shown a reluctance to review military matters requiring military expertise wherein there have been established safeguards for the protection of the individual's constitutional rights.

However, the courts have, on numerous occasions, granted review of military matters. In *Harmon v. Brucker,* 355 U.S. 579, 78 S.Ct. 433, 2 L. Ed. 2d 503 (1958), it was held that military matters could be reviewed so that a determination could be made as to whether or not the military authorities acted within the scope of statutory and regulatory authority. This Honorable Court in *Sterling v. Constantin,* 287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375 (1932), decided that the allowable limits on military descretion and whether thay have been overstepped, in a particular instance, are judicial questions. Furthermore, in *Schatten v. United States,* 419 F. 2d. 187 (6th Cir. 1969), it was held that while it is not the judiciary to direct the exercise of discretion in a particular way that it is appropriate for the judiciary to require that authorities temper the exercise of their discretion with their own regulations and the laws of the United States.

It is well rooted in our judicial system that for every wrong there exists a remedy. This maxim should find no less application to wrongs committed against an individual, who holds a position in a military organization, than wrongs committed against a person who holds a purely civilian position.

One who is a member of a military unit, whether it be a regular, reserve, national guard or militia type of unit, does not as a result of this particular type of employment, lose or relinquish his constitutional rights, especially his right to procedural due process.

In *Calhoun v. Doster,* 324 F. Supp. 736 (M.D. Ala. 1971), the plaintiff, a member of the Alabama Air National Guard and a technician therewith, brought an action for deprivation of his rights. In holding that the

plaintiff was entitled to his constitutional rights, even though a member of the Air National Guard, the Court noted a Page 743, as follows:

> The law is quite clear in this Circuit that an individual, in assuming public employment, retains all the rights and privileges otherwise afforded him by the United States Constitution. *Orr v. Thorpe,* 427 F. 2d 1129 (5th Cir. 1970); *Pred v. Board of Public Instruction,* 415 F. 2d 851 (5th Cir. 1969). One of these constitutionally protected rights is that of the individual to be free from arbitrary and unreasonable conduct on the part of the government . . . .

It is the position of the plaintiff that, although he was a member of the Tennessee Air National Guard and employed as a technician therewith, he retained all of the rights, privileges and immunities granted and guaranteed to individuals by the Constitution and laws of the United States, including the right not to be subjected to the arbitrary, unreasonable and unconstitutional actions of the Petitioners and the right to due process and equal protection.

The Honorable Justice Douglas in his opinion in *Winters v. United States,* 89 S. Ct. 57, stated at Page 59-60, as follows:

> ....There are those who in tumultous times turn their faces the other way saying that it is not the function of the courts to tell the Armed Forces how to run a war. Of course that is true. But it is the function of the courts to make sure, in cases properly coming before them, that the men and women constituting our Armed Forces are treated

> as honored members of society whose rights do not turn on the charity of a military commander. As stated in *Ex Parte Milligan,* supra, civil liberty and unfettered military control are irreconcilably antagonistic. A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution and engrossed by Congress in our Public Laws.

The Respondent's complaint clearly raised an issue as to whether or not his commander and the board of officers had acted outside the scope of their statutory and regulatory authority, in that their actions were arbitrary, capricious, unreasonable and an abuse or misuse of his commander's allegedly vested discretion or prerogative and were purposeful and intentional actions that were calculated to result in the Respondent's loss of his employment as a technician and would further frustrate or deny the Respondent an effective method of administrative review. (Complaint of respondent, paragraphs 7, 14, 16, 17 and 18; Petitioners' App. 21, 23 and 25).

Once the Respondent's commander convened the board of officers to hear charges and statements against the Respondent, he became clothed with the right to receive a copy or be informed of the charges or statements to be made against him and the right to appear and/or be represented in order to receive a fair and impartial hearing before the board, rights which are a vital part of the Respondent's entitlement to procedural due process. The actions of the commander, in refusing the Respondent the right to receive a fair and impartial hearing, were outside his scope of statutory and regulatory authority and constituted arbitrary and

unreasonable actions which infringed on and denied the Respondent his constitutional right of procedural due process. Therefore, in accordance with *Harmon v. Brucker, supra,* the Respondent's commander's decision and actions are clearly subject to judicial review.

The Respondent further contends that the decision made by his commander is subject to judicial review inasmuch as the Respondent's complaint alleged that the discretion or prerogative allegedly vested in his commander to decide whether or not to allow a member to re-enlist, as it was used against the Respondent to deny his re-enlistment, is so vague and lacking in objective or ascertainable standards or criteria to guide or guage the commander's decision as to be unconstitutional, and therefore constituted arbitrary and unreasonable action which infringed on and denied the Respondent his constitutional rights of due process and equal protection. Also, the Respondent has been unable to discover any statute or regulation which vests his commander with this alleged discretion or prerogative and the Petitioners have totally failed to allege that such a statute or regulation exists and therefore the Respondent entertains serious doubt as to the existence of the same. However, even if this alleged discretion or prerogative exists the Respondent does not contend that this Honorable Court should or could substitute its thinking for that of the commander's, but would assert that there was an abuse, of this alleged discretion or prerogative, which amounted to a denial of the Respondent's rights and that Federal Courts are empowered with the necessary authority to grant the Respondent relief from this abuse.

As the Petitioners have noted in their brief, the United States Court of Appeals for the Fifth Circuit in

the case of *Mindes v. Seaman,* 453 F. 2d 197 (5th Cir. 1971) at page 201, set forth certain factors which should guide a court in deciding whether or not to review military matters. The Fifth Circuit held that as a primary consideration there should be no judicial review of internal military affairs in the absence of an allegation of the deprivation of a constitutional right or a claim that the military violated or failed to follow its own regulations or the applicable statutes. However, the Fifth Circuit went further and stated that a district court, which has been presented with sufficient allegations to meet the primary considerations for review, must examine the substance of the allegations, using certain factors, in order to make a determination as to whether or not review of the military matters are justified in the particular case. The factors which were indicated were: (1) the nature and strength of the plaintiff's challenge to the military determination, with constitutional claims normally being more important than those having only a statutory or regulatory base, (2) the potential injury that the plaintiff could suffer if review is denied, (3) the type and degree of anticipated interference with the military function if review is granted, however, interference per se is insufficient since there will always be some interference when review is granted, and, (4) the extent to which the exercise of military expertise or discretion is involved.

An application of the factors set forth in *Mindes v. Seaman, supra,* to the allegations in the Respondent's complaint, filed in the District Court, justifiably indicates that there should have been a review of the commander's and the board of officers' actions. The Respondent's complaint alleged both a deprivation of his constitutional rights and a violation, by his commander, of applicable statutes or regulations. The

alleged deprivation of the Respondent's constitutional rights were the result of his commander's refusal to allow him to appear and/or be represented before the board of officers for the purpose of receiving a fair and impartial hearing, his commander's refusal to furnish him with a copy of the charges or statements to be made against him before the board and further that the alleged prerogative or discretion vested in the Respondent's commander was unconstitutional inasmuch as it was not particulary delineated. The Respondent alleged that there was a violation of the applicable statutes or regulations, by his commander, inasmuch as the commander's actions were arbitrary, capricious, unreasonable and an abuse or misuse of his allegedly vested discretion or prerogative and were purposeful and intentional actions that were calculated to result in the Respondent's discharge from his technician's employment. Respondent insists that these allegations are not tenuous of frivolous, but are of such a substantial nature as to demand review.

The Respondent asserts that, as a result of the Petitioners' actions, he has been caused to suffer substantial injury. The Respondent had, until his date of discharge, accrued approximately 17-½ years of creditable time toward the 20 years required for his military retirement benefits. He had a reasonable expectation that he would be allowed to re-enlist and thereby complete the remaining 2-½ years required for him to be entitled to his retirement benefits. The actions of the Petitioners not only deprived the Respondent of these retirement benefits, but it had the result of causing him to lose his technician position with the Air Guard. Additionally, the Respondent's age now presents a hardship in his efforts to provide for his future. Therefore, the potential injury to the Respond-

ent, if review is denied, is of a real and substantial nature.

The Respondent had more than a mere subjective expectancy of re-enlistment. Respondent's past military record, including his creditable time in service, various awards and citations presented to him for his performance of duty and prior re-enlistments, were such as to create a reasonable and justificable expectation of re-enlistment which is subject to the protection of procedural due process.

The instant case is distinguishable from *Turner v. Egan,* 414 U.S. 1105, affirming 358 F. Supp. 560 (D. Alaska 1973), wherein judicial review was denied. In *Turner* the plaintiffs were not retained in the National Guard, however, they were presented an opportunity to appear before the board which was to decide whether or not they should be retained in the National Guard. Furthermore, it was shown that the plaintiffs were honorably discharged after more than 20 years of creditable service time and were therefore entitled to full retirement benefits. However, in the case at bar, the Respondent was denied an opportunity to appear before the board and he has no entitlement to any of the retirement benefits which are a valuable property interest.

The complaint filed by the Respondent in the Federal District Court contained allegations that the decision, made by the Respondent's commander, not to allow the Respondent to re-enlist, was made for non-military reasons. It is obvious that taking the Respondent's allegations and construing them most favorably to him at this point in the proceedings that they raise a genuine issue as to his interest in continued employment with the

Tennessee Air National Guard. See *Perry v. Sindermann,* 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

A review of the commander's action, in this case, would not seriously impede the Air Guard in the performance of its mission and to require the Petitioners to grant the Respondent his constitutional rights to due process and equal protection would result in very little, if any, interference with the military function of the Tennessee Air National Guard. The Petitioners are misguided in the conviction that if the Sixth Circuit's decision, in the instant case, is allowed to stand that it presents the potentiality for tremendous abuse and would thereby cause much interference with the military function. The Sixth Circuit's decision was in conformity with previous established criteria for judicial review of military matters.

The Respondent does not contend that the judiciary should substitute its judgment for that of his commander, but merely contends that the court should require that the alleged discretion or prerogative be tempered to such an extent so as to not be unreasonable and arbitrary and thereby amount to a denial of the Respondent's constitutional rights. Further, the Respondent's position is that there is no military expertise or discretion involved when, as the Respondent alleged, the decision was made for other than military reasons.

The Court of Appeals, in its decision in the instant case, correctly and aptly noted that the threshold question, for a court in deciding whether the doctrine on nonreviewability of military decisions is applicable in a particular case, must of necessity be directed primarily

toward the nature of the decision which a party seeks reviewed and not the mere identity of the decision-maker. The Court further noted that decisions may be outside the boundaries of the doctrine of nonreviewability when they are made for non-military reasons involving no military expertise.

Petitioners' assertion that the Sixth Circuit Court of Appeals erroneously decided that 32 U.S.C. §709(e)(3) modified 32 U.S.C. §709(e)(1) is without merit. The Sixth Circuit simply stated that, in view of the allegations in the complaint, which have to be construed most favorably to the Respondent, that the Petitioners' had used the Respondent's military aspect of his employment in order to remove him from the civilian aspect. Further, that 32 U.S.C. §709(e)(3) provided a method of removing the Respondent from his technician's employment and that the Respondent's commander's decision to refuse his re-enlistment in order to remove him from his technician's job constituted a military decision made for a non-military reason and is therefore subject to judicial review. For the Court of Appeals to have held otherwise would have been to allow the Respondent's commander and the board of officers, through their constitutionally impermissible conduct and actions, an abuse or misuse of allegedly vested discretion and actions outside of their scope of statutory and regulatory authority, to do through the back door that which they could not do through the front door.

Furthermore, Petitioners' statement, that the Sixth Circuit's decision makes 32 U.S.C. §§709(b) and (e)(3), co-equal with the result of creating a bifurcated standard for the military which would wreak havoc, is also without merit. The Court of Appeals decision

correctly determined that each statute must be read, kept and utilized in its proper perspective instead of in some impermissive manner.

A literal reading and interpretation of Petitioners' brief would indicate that the Petitioners' labor under the belief that a complaining party could or should not be allowed judicial review of a military decision even if there were allegations that the decision was based on impermissible constitutional, statutory and regulatory considerations such as the complaining party's race or sex.

CONCLUSION

For the foregoing reasons the Respondent respectfully submits that the decision of the United States Court of Appeals for the Sixth Circuit is judicially correct and should be affirmed in all respects.

Respectfully submitted,

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